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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re CHRISTINA J., et al., Persons
Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

BARBARA J.,

Defendant and Appellant.

B234175

(Los Angeles County
Super. Ct. No. CK38007)

APPEAL from a judgment and dispositional order of the Superior Court of Los Angeles County, Robert L. Stevenson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and reversed in part.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Barbara J. (mother), seeks to reverse the trial court's jurisdictional finding that her daughter, Christina J. (Christina), is a dependent of the court and the trial court's dispositional order removing custody of Christina from mother.

FACTUAL AND PROCEDURAL BACKGROUND¹

Mother has three children: Terrance B.², Bobby A. (Bobby) (born in August 1993), and Christina (born in January 1998).

In early April of 2011, referral was made to the Department of Children and Family Services (DCFS) regarding physical abuse of Christina by mother. The reporter stated that Christina explained that "she does not want to live with [mother] anymore;" "[m]other has been beating her[;] [t]he last incident was yesterday (04/04/11); mother hit Christina with a belt on the right arm and leg [because] . . . mother thought Christina [] ditched school[;] [and t]his morning (04/05/11), mother threatened to hit her with a shoe, because Christina was looking for her report card in mother's bag[;] . . . mother threatens to hit her everyday and she gets hit every other day." Christina also provided the same information to the family's residential case manager, Deirdre Anderson, who was interviewed by DCFS. Christina's story was consistent when she was interviewed by DCFS as well and the DCFS social worker observed bruises on Christina's right arm,

¹ The factual and procedural background is drawn from the record, which includes a one-volume Clerk's Transcript, a supplemental Clerk's Transcript and a one-volume Reporter's Transcript.

² Terrance's date of birth is not included in the record. The record shows that Terrance is currently in jail and does not reside with mother and her two other children. Terrance is not a party to the Welfare and Institutions Code section 300 petition filed in this case, nor is he a party to this appeal.

buttocks and thigh, corroborating Christina's story. However, Christina later recanted these statements in her testimony before the trial court at the May 24, 2011 adjudication and disposition hearing.

In addition to allegations of physical abuse, the reporter stated that Christina also suspects mother of "using crack cocaine every night in the bedroom or the bathroom," that mother drinks alcohol and that there are alcoholic beverages in the refrigerator of their home. When interviewed by the DCFS social worker, Christina stated that approximately three months prior she found a "glass crack pipe in her mother's drawer, [describing the object as] a glass cylinder, with a mouth piece and . . . dirty with drug residue on the other end." However, Christina stated there were no drugs in the object. Christina stated that when she asked mother about the object, mother denied knowing what it was and stated she'd throw it away. Additionally, DCFS reported that "Christina stated she thought her mother was using crack cocaine every night in the bathroom or her bedroom with her boyfriend, Tony [G.] . . . [and that] there had been occasions when she either knocked on mother's bedroom door or bathroom door, only to have mother or Mr. [G.] open the door looking 'jumpy' and 'sweaty.' [And, that] on these occasions there was smoke in the bedroom or bathroom and the smoke did not smell of tobacco." Christina also recanted these statements in her testimony before the trial court, however.

Based on the foregoing, on April 8, 2011, DCFS filed a Welfare and Institutions Code section 300³ petition alleging, inter alia⁴, the following: “a-1 [¶] On 4/4/11, the children, Bobby . . . and Christina[’s] . . . mother, . . . physically abused the child, Christina, by striking the child’s right arm and leg with a belt. On prior occasions, the mother struck the child. Such physical abuse was excessive and caused the child unreasonable pain and suffering. The child is afraid of the mother and refuses to remain in the mother’s home and care due to the mother’s ongoing physical abuse of the child. The physical abuse of the child by the mother endangers the child’s physical health and safety and places the child and the child’s sibling, Bobby, at risk of physical harm, damage, danger and physical abuse. . . . [¶] b-2 [¶] The children, Bobby . . . and Christina[’s] . . . mother . . . has a thirteen year history of substance abuse including cocaine, marijuana and alcohol and is a current abuser of illicit drugs and alcohol, which renders the mother incapable of providing the children with regular care and supervision. In 2011 and on prior occasions, the mother possessed and used and was influence [sic] of illicit drugs while the children were in the mother’s care and supervision. The mother possessed a drug pipe in the children’s home within access of the child Christina. The mother resumed the substance abuse after the mother was ordered by the Juvenile Court to regularly participate in a substance abuse rehabilitation program. The children are prior dependents of the Juvenile Court due to the mother’s

³ Unless stated otherwise, all section references are to the Welfare and Institutions Code.

⁴ The section 300 petition made other allegations. However, only counts a-1 and b-2 were sustained as pled by the trial court.

substance abuse. The mother's abuse of illicit drugs and alcohol endangers the children's physical health and safety, creates a detrimental home environment and places the children at risk of physical harm and damage." The section 300 petition was dismissed with respect to Bobby on May 10, 2011. DCFS detained Christina in foster care.

As noted above in the petition's allegations, DCFS was previously involved with this family. However, after each such involvement, the case was closed with the children being returned to mother's custody.

Mother denied the allegations in the most recent petition. At DCFS's request, mother took a drug screen on April 11, 2011, which showed positive results for opiates, specifically morphine and codeine. Notably, the drug test was negative for cannabinoids and cocaine metabolites. Further, mother stated that she was taking prescription Tylenol No. 3 (which contains codeine)⁵ for her mid-back injury involving a lumbar disk disorder. Although Christina alleged that mother was abusing alcohol, the test was negative for urine alcohol.

Bobby denied that mother used drugs or physically abused Christina.

At the adjudication and dispositional hearing on May 24, 2011, the trial court found Christina's initial statements regarding the physical abuse and mother's usage of drugs to be more credible than her live testimony before the court, during which she recanted all of the allegations, noting that Christina had a motive (wanting to leave

⁵ Mother was also reported to be taking Valium. However, it is not clear whether the drug screen tested for benzodiazepines. The results do not indicate that mother tested positive for benzodiazepines.

foster care) to change her story. The court stated, “It’s like the boyfriend or the person that she is seeing that Christina is saying that she thinks you are using crack every night in the bedroom or bathroom, drinking; that there was this pipe, but it was in your drawer and has residue on the pipe. There was nothing in it, but there was white^[6] residue in the pipe. There is this letter^[7] that was written by Christina that she acknowledged about her mother, I think, smoking some kind of drugs. [¶] So I think that information, I think I have to give more weight to. I think Christina obviously wants to go home, and I think she has good reason to try to indicate to the court that her mother doesn’t use drugs and her mother didn’t hit her with a belt, but I think her previous statements are more consistent with what occurred, that she was hit by a belt. This is not the first time.” The trial court sustained the petition with respect to the allegations in counts a-1 and b-2, found Christina to be a child described under section 300 and adjudged her to be a dependent of the court.

With respect to the trial court’s dispositional order removing Christina from mother’s custody, the court stated to mother, “I want you to be doing some weekly on-demand drug testing, okay. I don’t want you taking anything that has codeine in it. Anything like that. You have a history, so you are having to fight that history – a previous history, okay, in this court with drugs. I want you to show me that you don’t

⁶ The record does not indicate that the residue in the pipe was white.

⁷ The letter at issue was directed to Christina’s boyfriend and states in relevant part, “I got use in trople that really meast use up the now my mom say’s I to Fuchin young to have a boy friend but she don’t say nun of that stuff When she high or smoking drugs”

need to have codeine in your system. There is, like, extra strength Tylenol.” The court then ordered mother to return in 60 days with “a letter from your orthopedist that says you have a lower disk problem.” When mother stated she did not have an orthopedist, the trial court stated, “X-rays are not very good, as far as telling you about bulging disks, or, you know, disks that are herniated. You need, generally, to have an MRI to figure that out. So if you are getting just codeine from your general practice doctor, I have a problem with that. You need to get something more from a specialist or something that says you need to have that.” Mother has not produced a prescription for Tylenol No. 3 from a specialist. The trial court found that there is “substantial risk of detriment to return Christina today to the mother.”

Mother filed a notice of appeal on June 8, 2011.

ISSUES ON APPEAL

Mother contends that the evidence does not support the trial court’s jurisdictional findings that (1) mother physically abused Christina; or (2) mother has relapsed and is again abusing drugs and alcohol. Mother also contends that the evidence does not support the trial court’s finding that there is a substantial danger to Christina’s physical health, safety, protection or physical or emotional well-being justifying Christina’s removal from mother’s custody.

DISCUSSION

1. Standard of Review

The standard of review for dependency proceedings under section 300 is substantial evidence. (*In re Carrie W.* (1978) 78 Cal.App.3d 866, 872.) With respect to

our review of a trial court's orders under section 361, the clear and convincing standard is for the edification and guidance of the trial court and is not the appropriate standard on review. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880.) Instead, we also review such an order under the substantial evidence standard. (*Ibid.*)

“When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment.” (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) “ ‘It is an elementary . . . principal of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact].’ [Citation.]” (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 207.) “ ‘Evidence sufficient to support the court’s finding “must be ‘reasonable in nature, credible, and of solid value; it must actually be “*substantial*” proof of the essentials which the law requires in a particular case.’ ” [Citation.] . . . In the presence of substantial evidence, appellate justices are without the power to reweigh conflicting evidence and alter a dependency court determination. [Citations.]” (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.)

2. *Substantial Evidence Supports the Dependency Court's Jurisdictional Finding that Mother Used Inappropriate Discipline Against Christina and Its Dispositional Order Removing Christina From Mother's Custody*

Mother contends that the trial court's findings that mother physically abused Christina (count a-1) and that continuing custody of Christina by mother would place Christina at risk of substantial danger to her physical health, safety, protection, or physical or emotional well-being, was in error as such findings were not supported by substantial evidence. We disagree.

Section 300, subdivision (a), provides that the following will cause a child to fall under the jurisdiction of the court and be adjudged a dependent of such court: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. . . . For purposes of this subdivision, 'serious physical harm' does not include reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury."

Section 361, subdivision (c), states in relevant part, "A dependent child may not be taken from the physical custody of his or her parents . . . unless the juvenile court finds clear and convincing evidence of . . . (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . custody."

Here, the record is replete with substantial evidence that mother beat Christina with a belt to her arm, thigh and buttocks on at least one occasion and threatened to beat her with a shoe on another. Christina also had bruises that corroborated her story of abuse with the belt. Additionally, Christina's initial statements were that mother threatened to abuse Christina daily and that such abuse actually occurred every other day. Christina's account of these incidents as told to the DCFS social worker is consistent with what she told two other individuals. The trial court's finding that Christina has suffered serious physical harm inflicted non-accidentally by mother is supported by the record.

Although mother argues that some of the evidence in the record contradicts this evidence, including Christina's own recanting of her earlier statements, when reviewing the trial court's findings on appeal, we only look at evidence that supports the court's findings and disregard any contrary evidence. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1526.) Thus, we find mother's argument to be without merit. The record clearly shows that there was sufficient evidence on which the trial court based its finding that mother was not engaging in "reasonable and age-appropriate spanking to the buttocks" of Christina, that there was evidence of serious physical injury resulting from her disciplinary tactics and that mother had engaged in similar actions against Christina on more than one occasion.

Furthermore, the seriousness of Christina's injuries and the ongoing nature of the abuse support the trial court's finding that substantial danger exists to Christina's

physical health, safety, protection, or physical or emotional well-being justifying her removal.

3. *Substantial Evidence Does Not Support the Trial Court's Jurisdictional Finding that Mother is a Current Abuser of Drugs and Alcohol Resulting in Mother's Inability to Provide Regular Care for Christina*

While “[i]t is true that ‘one does not appeal from a finding; one appeals from a judgment or from an order that the Legislature has designated as appealable’ [Citation][,] . . . review of findings is normally obtained by appeal from the ensuing judgment or order. [Citations.]” (*In re S.B.* (2009) 46 Cal.4th 529, 534.) Although the trial court’s findings regarding the physical abuse of Christina are sufficient for us to affirm the judgment and the removal order, we will review the trial court’s remaining findings because the affirming of unsupported allegations in this case would prejudice mother, making her reunification with Christina more difficult. (See, e.g., *In re Matthew S.* (1996) 41 Cal.App.4th 1311.)

Mother contends that the trial court erred in sustaining a finding that she has relapsed and is again abusing alcohol and drugs (count b-2) because the evidence does not support such a finding. Mother also contends that DCFS failed to show that any such usage of drugs or alcohol has resulted in a detriment to Christina and thus, Christina should not have been removed from her custody. We agree in part.

Section 300, subdivision (b), states that the following will cause a child to fall under the jurisdiction of the court and be adjudged a dependent of such court: “The child has suffered, or there is a substantial risk that the child will suffer, serious physical

harm or illness, as a result of the . . . inability of his or her parent . . . to provide regular care for the child due to the parent's . . . substance abuse.”

The evidence is insufficient to show that mother is currently abusing alcohol and drugs. For purposes of our review, we treat all of Christina's initial statements as true, as found by the trial court, because we are without the power to reweigh such evidence. However, even taking all such statements as true, the evidence is not substantial proof of mother's current abuse of alcohol or drugs.

Christina informed DCFS that she suspected mother of using crack cocaine. However, though her suspicion may be real and her statement truthful, it is not a factual statement that mother actually is using crack cocaine. Further, in combination with the undisputed evidence of mother's negative drug screen for cocaine metabolites, Christina's suspicion is not enough to accept as proof that mother actually is using crack cocaine.

Christina informed DCFS that she found a “crack pipe” in mother's dresser.⁸ The pipe was dirty with unidentified drug residue but contained no drugs. Although mother is a recovering drug addict, the mere possession of a crack pipe without evidence of possession of drugs and/or actual drug use does not lead to the inference that mother is *currently* abusing drugs. Mother has lived in the apartment for eight years, during which she relapsed in the past. The pipe may have been a vestige of her

⁸ Respondent alleges in its brief that Christina found drug paraphernalia in mother's purse. However, the portion of the record cited does not support this statement.

past that she failed to discard. Again, the undisputed drug screen was negative for cocaine metabolites.

Christina stated that she occasionally found mother and mother's boyfriend looking "jumpy" and "sweaty" upon opening the door to either the bedroom or bathroom when Christina knocked. She also stated that there was smoke in the room and it did not smell of tobacco. There are numerous reasons why mother and her boyfriend may appear a little jumpy and sweaty upon opening the door to find mother's thirteen-year old daughter there. Christina did not state what the non-tobacco smoke smelled like. It is possible that the smoke was incense or a number of other non-illicit substances. It cannot reasonably be inferred that mother and her boyfriend were smoking crack cocaine from these statements without further evidence of such usage.

The trial court also relied on Christina's statement in her letter to her boyfriend in which she commented about mother's not caring that Christina was too young to see her boyfriend when mother is "high or smoking durgs [sic]." The comment includes no further details as to when, how or where mother is using such drugs. Without more, it cannot reasonably be inferred that mother is *currently* abusing drugs.

Finally, Christina stated that mother drinks alcohol and that there are alcoholic beverages in the refrigerator. Mother admitted that she occasionally drank alcoholic beverages. In California, alcoholic beverages can be legally sold to individuals over the age of 21 years. (Bus. & Prof. Code § 25658.) Mother was born in 1959 and is clearly of legal age to consume alcoholic beverages. This evidence is insufficient to establish that mother is abusing alcohol.

The only evidence supporting any current drug use by mother is the uncontradicted drug screen which showed that mother tested positive for opiates. Mother explains that such result is related to her using Tylenol No. 3 for her back pain. The occasional use of Tylenol No. 3 for back pain is not sufficient to show that mother is abusing drugs. Although mother has yet to produce a prescription, the trial court unreasonably demanded that mother provide a prescription from an orthopedist and that a legitimate prescription from a general practitioner was insufficient.

Even assuming that mother is currently abusing Tylenol No. 3, DCFS failed to produce any evidence that mother's usage is directly linked to serious physical harm or illness to Christina that results from mother's inability to provide regular care for Christina. Although it is true that mother physically abused Christina, such abuse is not linked to mother's ingestion of Tylenol No. 3. Additionally, the DCFS social worker specifically stated that mother's home was "neat and clean," had "working utilities, appropriate furnishings, and ample food," both Bobby and Christina "have their own beds and ample possessions," there were no "child safety hazards," and there were no "signs of drugs, drug paraphernalia, or alcohol in the home, or refrigerator." DCFS also reported that "Christina appears to have been well provided with food, shelter and clothing." These statements are supported by similar statements made by Deirdre Anderson, the family's residential case manager.

The mere usage of drugs by a parent is not generally, by itself, a sufficient basis on which a finding of harm or risk of harm can be made without some further nexus between such usage and the child at issue. (See e.g., *In re Alexis E.* (2009))

171 Cal.App.4th 438, 453 [“ . . . [W]e have no quarrel with Father’s assertion that his use of medical marijuana, *without more*, cannot support a jurisdiction finding that such use brings the minors within the jurisdiction of the dependency court, not any more than his use of the medications prescribed for him by his psychiatrist brings the children within the jurisdiction of the court.”]; see also, *In re David M.* (2005) 134 Cal.App.4th 822, 829-830 [The court held that where the evidence was uncontradicted that the child “was healthy, well cared for, and loved, and that mother and father were raising him in a clean, tidy home,” and there was no evidence linking mother’s substance abuse problems to any actual harm to the child or his sibling, or to a substantial risk of serious harm, jurisdiction under section 300, subdivision (b), was unwarranted.].) Here, there is no evidence in the record linking mother’s usage of Tylenol No. 3 to any harm to Christina. Therefore, the trial court’s finding of jurisdiction under section 300, subdivision (b), is not supported by the record.

Without an adequate basis for finding jurisdiction of Christina under section 300, subdivision (b), there is no basis for finding that removal is warranted based on those same findings. The requirements of section 361, subdivision (c), are also not met here.

DISPOSITION

The trial court's judgment and dispositional order relating to its findings under section 300, subdivision (a), are affirmed. The trial court's judgment and dispositional order relating to its findings under section 300, subdivision (b) are reversed.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.